

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 03, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MATTHEW W.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:21-cv-03070-MKD

ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

ECF Nos. 16, 17

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 16, 17. The Court, having reviewed the administrative record and the parties'
3 briefing, is fully informed. For the reasons discussed below, the Court denies
4 Plaintiff's motion, ECF No. 16, and grants Defendant's motion, ECF No. 17.

5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
13 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
14 (quotation and citation omitted). Stated differently, substantial evidence equates to
15 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
16 citation omitted). In determining whether the standard has been satisfied, a
17 reviewing court must consider the entire record as a whole rather than searching
18 for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
5 416.902(a). Further, a district court “may not reverse an ALJ’s decision on
6 account of an error that is harmless.” *Id.* An error is harmless “where it is
7 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
8 (quotation and citation omitted). The party appealing the ALJ’s decision generally
9 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
10 396, 409-10 (2009).

11 **FIVE-STEP EVALUATION PROCESS**

12 A claimant must satisfy two conditions to be considered “disabled” within
13 the meaning of the Social Security Act. First, the claimant must be “unable to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
18 “of such severity that he is not only unable to do his previous work[,], but cannot,
19 considering his age, education, and work experience, engage in any other kind of
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
2 analysis concludes with a finding that the claimant is disabled and is therefore
3 entitled to benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant
8 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
9 700 F.3d 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On December 31, 2018, Plaintiff applied for Title XVI supplemental
12 security income benefits alleging a disability onset date of December 1, 2018.³ Tr.

13 _____
14 ³ Plaintiff previously applied for Title XVI benefits on January 25, 2012, which
15 resulted in a November 19, 2013 unfavorable decision from an ALJ. Tr. 51-70.
16 Plaintiff appealed the decision, which resulted in a remand. Tr. 77-82. Plaintiff
17 appeared at a remand hearing, which resulted in another unfavorable decision on
18 October 25, 2017. Tr. 87-115. Plaintiff appealed the decision to the Appeals
19 Council, who declined to review the decision on December 17, 2018. Tr. 116-21.
20 Plaintiff appealed to this Court, which does not show in the record. *See Matthew*

1 10, 122, 244-49. The application was denied initially, and on reconsideration. Tr.
2 154-66, 168-74. Plaintiff appeared before an administrative law judge (ALJ) on
3 October 6, 2020. Tr. 23-50. On October 29, 2020, the ALJ denied Plaintiff's
4 claim. Tr. 7-22.

5 At step one of the sequential evaluation process, the ALJ found Plaintiff has
6 not engaged in substantial gainful activity since December 31, 2018. Tr. 12. At
7 step two, the ALJ found that Plaintiff has the following severe impairments:
8 posttraumatic stress disorder (PTSD), depressive disorder, anxiety disorder,
9 personality disorder, and disorder of written expression. *Id.*

10 At step three, the ALJ found Plaintiff does not have an impairment or
11 combination of impairments that meets or medically equals the severity of a listed
12 impairment. Tr. 13. The ALJ then concluded that Plaintiff has the RFC to perform
13 work at all exertional levels but with the following limitations:

14 [Plaintiff] is able to understand, remember, and carryout 1-2 step tasks
15 with only occasional changes in the work setting. He can have only
16 minimal supervisory contact. He can work in proximity to others but
not in cooperative or team efforts, and he can only have brief and

17 *W. v. Saul*, No. 1:19-cv-3008-MKD (E.D. Wash. Sept. 24, 2019). This Court
18 denied Plaintiff's motion for summary judgment. *Id.* (ECF No. 18). Plaintiff does
19 not raise an issue regarding the lack of documentation of the prior appeal in the
20 record.

1 superficial interaction with coworkers. He should have no interaction
2 with the general public.

3 *Id.*

4 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 17. At
5 step five, the ALJ found that, considering Plaintiff's age, education, work
6 experience, RFC, and testimony from the vocational expert, there were jobs that
7 existed in significant numbers in the national economy that Plaintiff could perform,
8 such as laundry worker, store laborer, and yard worker. Tr. 18. Therefore, the
9 ALJ concluded Plaintiff was not under a disability, as defined in the Social
10 Security Act, from the date of the application through the date of the decision. *Id.*

11 On March 30, 2021, the Appeals Council denied review of the ALJ's
12 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
13 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

14 ISSUES

15 Plaintiff seeks judicial review of the Commissioner's final decision denying
16 him supplemental security income benefits under Title XVI of the Social Security
17 Act. Plaintiff raises the following issues for review:

- 18 1. Whether the ALJ properly applied *Chavez*;
- 19 2. Whether the ALJ conducted a proper step-five analysis;
- 20 3. Whether the ALJ conducted a proper step-three analysis;
- 4. Whether the ALJ properly evaluated Plaintiff's symptom claims;

1 5. Whether the ALJ properly evaluated the medical opinion evidence; and

2 6. Whether the ALJ properly evaluated lay witness evidence.

3 ECF No. 16 at 2.

4 DISCUSSION

5 A. *Chavez*

6 Plaintiff contends the ALJ erred in finding Plaintiff failed to rebut the
7 presumption of ongoing non-disability. ECF No. 16 at 4-7. “The principles of res
8 judicata apply to administrative decisions, although the doctrine is applied less
9 rigidly to administrative proceedings than to judicial proceedings.” *Chavez v.*
10 *Bowen*, 844 F.2d 691, 693 (9th Cir. 1998) (citing *Lyle v. Secy of Health and*
11 *Human Servs.*, 700 F.2d 566, 568 n.2 (9th Cir. 1983)). Under the doctrine of res
12 judicata, a prior, final determination of nondisability bars relitigation of that claim
13 through the date of the prior decision. *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir.
14 1995). Furthermore, in the Ninth Circuit, a prior, final determination of
15 nondisability “create[s] a presumption that [the claimant] continued to be able to
16 work after that date.” *Id.* (citation and internal quotation marks omitted).⁴

17
18 ⁴ Acquiescence Ruling (AR) 97-4(9) explains how *Chavez* differs from the Social
19 Security Administration’s (SSA) interpretation of Social Security policy requiring
20 de novo review of claims for unadjudicated periods. The SSA applies the *Chavez*

1 “However, the authority to apply res judicata to the period *subsequent* to a prior
2 determination is much more limited.” *Lester*, 81 F.3d at 827 (emphasis in
3 original).

4 “The claimant, in order to overcome the presumption of continuing
5 nondisability arising from the first administrative law judge’s findings of
6 nondisability, must prove ‘changed circumstances’ indicating a greater disability.”
7 *Chavez*, 844 F.2d at 693 (citation omitted). Examples of changed circumstances
8 include “[a]n increase in the severity of the claimant’s impairment,” “a change in
9 the claimant’s age category,” and a new issue raised by the claimant, “such as the
10 existence of an impairment not considered in the previous application.” *Lester*, 81
11 F.3d at 827-28 (citations omitted); *see also* Acquiescence Ruling (AR) 97-4(9),
12 available at 1997 WL 742758 at *3.

13 The ALJ found Plaintiff had not rebutted the presumption of non-disability,
14 as he had not met the burden of establishing that his mental impairments have
15 materially changed since the prior decision was issued. Tr. 15. Despite finding
16 Plaintiff had not met his burden in establishing his impairments have materially
17 changed since the prior decision, the ALJ performed the five-step analysis anew,

18 _____
19 presumption only as to claimants residing in the Ninth Circuit. AR 97-4(9),
20 available at 1997 WL 742758 at *3.

1 and came to different step two, RFC, and step five conclusions. Tr. 12-18, 93-107.
2 While the ALJ found Plaintiff continued to have no more than moderate limitations
3 in the Paragraph B areas of mental functioning, he considered the new criteria set
4 forth in the 2017 regulations when making the finding. Tr. 13.

5 Plaintiff contends his impairments increased in severity and thus he rebutted
6 the presumption. ECF No. 16 at 4-6. Plaintiff points to differences in the evidence
7 from the prior decision to the present decision, including evidence he now cannot
8 leave his home without being accompanied, and his decrease in his ability to
9 independently function. *Id.* However, Plaintiff cites entirely to his own statements
10 and the statements of his siblings; he does not point to any objective evidence to
11 support the argument that his mental impairments have increased in severity. *See*
12 *id.* For the reasons discussed *infra*, the ALJ reasonably rejected Plaintiff's claims
13 and the lay witness testimony.

14 Plaintiff also contends his new impairment, obesity, is a changed
15 circumstance as Plaintiff's siblings testified his weight impacted his physical
16 functioning. *Id.* at 6-7. However, Plaintiff does not point to any objective
17 evidence that supports a finding that his obesity causes more than minimal
18 limitations. *See id.* Further, Plaintiff also contends he declined to attend a
19 consultative examination because he was not interested in pursuing the physical
20

1 portion of his claim. ECF No. 16 at 15. The ALJ reasonably found Plaintiff's
2 obesity non-severe. *See* Tr. 13.

3 Plaintiff has failed to meet his burden in demonstrating his impairments have
4 materially worsened since the prior decision. Thus, the ALJ did not error in
5 finding Plaintiff failed to rebut the presumption of continued non-disability.
6 Further, any error is harmless as the ALJ performed a new five-step analysis.

7 **B. Step Five**

8 Plaintiff contends the ALJ erred at step five by relying on vocational expert
9 testimony given in response to an incomplete hypothetical, and contends the jobs
10 presented by the vocational expert do not exist in sufficient numbers. ECF No. 16
11 at 7-9.

12 The ALJ's RFC need only include those limitations found credible and
13 supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th
14 Cir. 2005) ("The hypothetical that the ALJ posed to the VE contained all of the
15 limitations that the ALJ found credible and supported by substantial evidence in
16 the record."). The hypothetical that ultimately serves as the basis for the ALJ's
17 determination, i.e., the hypothetical that is predicated on the ALJ's final RFC
18 assessment, must account for all of the limitations and restrictions of the particular
19 claimant. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir.
20 2009). "If an ALJ's hypothetical does not reflect all of the claimant's limitations,

1 then the expert’s testimony has no evidentiary value to support a finding that the
2 claimant can perform jobs in the national economy.” *Id.* However, the ALJ “is
3 free to accept or reject restrictions in a hypothetical question that are not supported
4 by substantial evidence.” *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006).
5 A claimant fails to establish that a step five determination is flawed by simply
6 restating argument that the ALJ improperly discounted certain evidence, when the
7 record demonstrates the evidence was properly rejected. *Stubbs-Danielson v.*
8 *Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

9 At step five of the sequential evaluation analysis, the burden shifts to the
10 Commissioner to establish that (1) the claimant is capable of performing other
11 work; and (2) such work “exists in significant numbers in the national economy.”
12 20 C.F.R. § 416.960(c)(2); *Beltran*, 700 F.3d at 389. There is no “bright-line rule
13 for what constitutes a ‘significant number’ of jobs.” *Beltran*, 700 F.3d at 389.
14 “There are two ways for the Commissioner to meet the burden of showing that
15 there is other work in ‘significant numbers’ in the national economy that claimant
16 can do: (1) by the testimony of a [VE], or (2) by reference to the Medical-
17 Vocational Guidelines” *Id.*

18 “When a claimant fails entirely to challenge a vocational expert’s job
19 numbers during administrative proceedings before the agency, the claimant forfeits
20

1 such a challenge on appeal, at least when that claimant is represented by counsel.”
2 *Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017).

3 Here, Plaintiff first contends the ALJ erred at step five by posing an
4 incoming hypothetical to the vocational expert. ECF No. 16 at 8. The ALJ found
5 Plaintiff has a severe impairment of “disorder of written expression” at step two
6 but did not ask the vocational expert if the listed jobs could be performed by a
7 person who spells at a third-grade level. *Id.* However, Plaintiff cites to testimony
8 regarding the third grade reading level, and to a consultative examination that
9 states “Disorder of written expression- per past testing.” Tr. 342. The consultative
10 examination references a 2011 examination conducted by Dr. Schneider that notes
11 Plaintiff had a high school reading level but third grade spelling level. Tr. 341.
12 However, the ALJ noted in the prior decision that Dr. Schneider’s examination
13 indicated Plaintiff’s MMPI-2 profile was invalid because Plaintiff over-endorsed a
14 high level of symptoms, and Dr. Peterson interpreted the examination results as
15 being evidence of symptom exaggeration. Tr. 99. Further, Dr. Schneider’s
16 examination is not contained in the current record. Thus, there is no current
17 objective evidence that Plaintiff spells at a third-grade level, and the past evidence
18 referenced by Plaintiff contains evidence of symptom exaggeration. The
19 hypothetical posed by the ALJ accounted for Plaintiff’s limited education. Tr. 46.
20 As such, the ALJ did not pose an incomplete hypothetical to the vocational expert.

1 Next, Plaintiff contends the jobs do not exist in sufficient numbers. ECF
2 No. 16 at 9. However, Plaintiff was represented and did not challenge the
3 vocational expert's job numbers at the hearing. *See* Tr. 48. Plaintiff also did not
4 raise the issue to the Appeals Council. Tr. 336-37. Thus, Plaintiff has forfeited the
5 challenge on appeal. *See Shaibi*, 883 F.3d at 1109. Plaintiff is not entitled to
6 remand on these grounds.

7 C. Step Three

8 Plaintiff contends the ALJ erred at step three by failing to find Plaintiff
9 meets a mental listing and by setting forth a "boilerplate dismissal of the evidence"
10 at step three. ECF No. 16 at 9-13. At step three, the ALJ must determine if a
11 claimant's impairments meet or equal a listed impairment. 20 C.F.R. §
12 416.920(a)(4)(iii).

13 The Listing of Impairments "describes for each of the major body systems
14 impairments [which are considered] severe enough to prevent an individual from
15 doing any gainful activity, regardless of his or her age, education or work
16 experience." 20 C.F.R. § 416.925. "Listed impairments are purposefully set at a
17 high level of severity because 'the listings were designed to operate as a
18 presumption of disability that makes further inquiry unnecessary.'" *Kennedy v.*
19 *Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S.
20 521, 532 (1990)). "Listed impairments set such strict standards because they

1 automatically end the five-step inquiry, before residual functional capacity is even
2 considered.” *Kennedy*, 738 F.3d at 1176. If a claimant meets the listed criteria for
3 disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii).

4 “To *meet* a listed impairment, a claimant must establish that he or she meets
5 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*,
6 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). “To *equal* a
7 listed impairment, a claimant must establish symptoms, signs and laboratory
8 findings ‘at least equal in severity and duration’ to the characteristics of a relevant
9 listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting
10 20 C.F.R. § 404.1526(a)). “If a claimant suffers from multiple impairments and
11 none of them individually meets or equals a listed impairment, the collective
12 symptoms, signs and laboratory findings of all of the claimant’s impairments will
13 be evaluated to determine whether they meet or equal the characteristics of any
14 relevant listed impairment.” *Id.* However, “[m]edical equivalence must be based
15 on medical findings,” and “[a] generalized assertion of functional problems is not
16 enough to establish disability at step three.” *Id.* at 1100 (quoting 20 C.F.R. §
17 404.1526(a)).

18 The claimant bears the burden of establishing her impairment (or
19 combination of impairments) meets or equals the criteria of a listed impairment.
20 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). “An adjudicator’s

1 articulation of the reason(s) why the individual is or is not disabled at a later step in
2 the sequential evaluation process will provide rationale that is sufficient for a
3 subsequent reviewer or court to determine the basis for the finding about medical
4 equivalence at step 3.” Social Security Ruling (SSR) 17-2P, 2017 WL 3928306, at
5 *4 (effective March 27, 2017).

6 Here, the ALJ found that Plaintiff’s impairments and combinations of
7 impairments did not meet or equal any listings, including Listings 12.04, 12.06,
8 12.08, 12.11, and 12.15. Tr. 13. The ALJ found Plaintiff had no more than
9 moderate limitations in the four areas of mental functioning and found neither the
10 Paragraph B nor Paragraph C criteria were satisfied. *Id.* While the ALJ did not
11 include further analysis under the step three heading, he referenced the later
12 findings of fact to support his analysis. *Id.* “An adjudicator’s articulation of the
13 reason(s) why the individual is or is not disabled at a later step in the sequential
14 evaluation process will provide rationale that is sufficient for a subsequent
15 reviewer or court to determine the basis for the finding about medical equivalence
16 at step 3.” SSR 17-2P, 2017 WL 3928306, at *4 (effective March 27, 2017).

17 Plaintiff argues the ALJ erred at step three, and contends he meets the
18 Paragraph B criteria and Paragraph C criteria of the mental health listings. ECF
19 No. 16 at 9-13. However, Plaintiff fails to specify which listing Plaintiff meets or
20 equals. To meet a listing, the Plaintiff has the burden of demonstrating each

1 component of the listing is met. *Tackett*, 180 F.3d at 1099; *Burch*, 400 F.3d at 683.
2 To meet a mental health listing, Plaintiff must satisfy the requirements of the
3 Paragraph A criteria for a specific listing, not just the Paragraph B or C criteria.
4 *See* 20 C.F.R. § 404, Subpart P, Appendix I. Plaintiff does not set forth any
5 argument as to how he satisfies the Paragraph A criteria for any listing. As the
6 Paragraph A criteria is not met for any listing, any error on the ALJ's part
7 regarding the Paragraph B or Paragraph C criteria would be harmless. *See*
8 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). Further, Plaintiff's
9 argument largely relies on his own self-reported limitations, which the ALJ gave
10 supported reasons to reject, for the reasons discussed *infra*. Plaintiff is not entitled
11 to remand on these grounds.

12 **D. Plaintiff's Symptom Claims**

13 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
14 convincing in discrediting his symptom claims. ECF No. 16 at 13-16. An ALJ
15 engages in a two-step analysis to determine whether to discount a claimant's
16 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
17 "First, the ALJ must determine whether there is objective medical evidence of an
18 underlying impairment which could reasonably be expected to produce the pain or
19 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
20 "The claimant is not required to show that [the claimant's] impairment could

1 reasonably be expected to cause the severity of the symptom [the claimant] has
2 alleged; [the claimant] need only show that it could reasonably have caused some
3 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
8 omitted). General findings are insufficient; rather, the ALJ must identify what
9 symptom claims are being discounted and what evidence undermines these claims.
10 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th
11 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant’s
12 symptom claims)). “The clear and convincing [evidence] standard is the most
13 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
14 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
15 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting
17 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
18 duration, frequency, and intensity of pain or other symptoms; 3) factors that
19 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; 5) treatment, other than medication, an individual receives or has
2 received for relief of pain or other symptoms; 6) any measures other than treatment
3 an individual uses or has used to relieve pain or other symptoms; and 7) any other
4 factors concerning an individual's functional limitations and restrictions due to
5 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
6 416.929(c). The ALJ is instructed to "consider all of the evidence in an
7 individual's record," to "determine how symptoms limit ability to perform work-
8 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

9 The ALJ found that Plaintiff's medically determinable impairments could
10 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
11 statements concerning the intensity, persistence, and limiting effects of his
12 symptoms were not entirely consistent with the evidence. Tr. 14.

13 *1. Work History*

14 The ALJ found Plaintiff's lack of work history contradicts his allegations
15 that he is unable to work due to his impairments. Tr. 15. Evidence of a poor work
16 history that suggests a claimant is not motivated to work is a permissible reason to
17 discredit a claimant's testimony that she is unable to work. *Thomas*, 278 F.3d at
18 959; SSR 96-7 (factors to consider in evaluating credibility include "prior work
19 record and efforts to work"); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
20 1996); 20 C.F.R. § 416.929.

1 The ALJ noted Plaintiff has never worked, and there is no evidence that he
2 has attempted to work. Tr. 15. Thus, the ALJ found Plaintiff's statements and his
3 siblings' statements that Plaintiff cannot work is not based on any documented
4 experience of trials and attempts to work, rendering the statements less persuasive.
5 *Id.* Plaintiff contends he tried to work, as documented in a prior ALJ decision.
6 ECF No. 16 at 13-14. While there is prior discussion of a brief work period, there
7 are no documented earnings in Plaintiff's record. Tr. 60, 62, 252-55. Plaintiff
8 contends his lack of work history, even prior to the current alleged onset date, is
9 consistent with his allegations as he previously alleged he became disabled in
10 2001. ECF No. 16 at 12-13. However, Plaintiff did not satisfy the requirements to
11 be found disabled in the prior application period; thus, his allegations that he has
12 not work since 2001 due to a disability is inconsistent with the evidence of record.
13 As such, the ALJ reasonably found that Plaintiff's allegations were inconsistent
14 with his history of not working even prior to his current alleged onset date. This
15 was a clear and convincing reason, supported by substantial evidence, to reject
16 Plaintiff's symptom claims.

17 2. *Lack of Treatment*

18 The ALJ found Plaintiff's lack of treatment was inconsistent with his
19 allegations of disabling limitations. Tr. 15-16. An unexplained, or inadequately
20 explained, failure to seek treatment or follow a prescribed course of treatment may

1 be considered when evaluating the claimant's subjective symptoms. *Orn v. Astrue*,
2 495 F.3d 625, 638 (9th Cir. 2007). And evidence of a claimant's self-limitation
3 and lack of motivation to seek treatment are appropriate considerations in
4 determining the credibility of a claimant's subjective symptom reports. *Osenbrock*
5 *v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001). When there is no evidence
6 suggesting that the failure to seek or participate in treatment is attributable to a
7 mental impairment rather than a personal preference, it is reasonable for the ALJ to
8 conclude that the level or frequency of treatment is inconsistent with the alleged
9 severity of complaints. *Molina*, 674 F.3d at 1113-14. But when the evidence
10 suggests lack of mental health treatment is partly due to a claimant's mental health
11 condition, it may be inappropriate to consider a claimant's lack of mental health
12 treatment when evaluating the claimant's failure to participate in treatment.
13 *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

14 While Plaintiff alleges disabling limitations, he has not sought any mental
15 health treatment during the relevant adjudicative period. Tr. 15. The ALJ noted
16 that while Plaintiff reports transportation is an issue for him obtaining treatment, he
17 also reported receiving transportation from his sister. *Id.* Plaintiff also alleged
18 there are long wait times to see providers, but there is no documentation of any
19 attempts to obtain treatment being impaired by long wait times. Tr. 14-15.
20 Plaintiff also contends he cannot attend treatment appointments due to his fear of

1 leaving his home and his need to be accompanied outside of this home. ECF No.
2 16 at 14. Plaintiff did not make such allegations at his hearing. *See* Tr. 26-28.
3 Plaintiff alleged waiting at his provider's office "really drags everything up," Tr.
4 31-32, but there is no evidence he visited his provider's office during the relevant
5 period. Plaintiff alleged in his prior application for benefits that he was unable to
6 go to appointments alone, which the ALJ found was inconsistent with Plaintiff's
7 ability to attend appointments and examinations unaccompanied. Tr. 97-99. At a
8 January 2019 examination, which is the only medical record in the file, there is no
9 indication Plaintiff was accompanied by someone during the appointment. Tr.
10 340-52. Plaintiff contends he also did not pursue treatment due to an aversion to
11 medication, ECF No. 16 at 14, however there is no evidence Plaintiff pursued any
12 treatment of any type during the relevant period. This was a clear and convincing
13 reason, supported by substantial evidence, to reject Plaintiff's symptom claims.

14 *3. Failure to Cooperate*

15 The ALJ found Plaintiff did not cooperate with the Agency's process as he
16 failed to attend a consultative examination. Tr. 15. If a claimant does not have a
17 "good reason" for failing to take part in a consultative examination, then the
18 adjudicator may make a negative disability determination based solely on this
19 failure to take part in the process. 20 C.F.R. § 416.918(a) ("If you are applying for
20 benefits and do not have a good reason for failing or refusing to take part in

1 a consultative examination or test which we arrange for you to get information we
2 need to determine your disability or blindness, we may find that you are not
3 disabled.”). The ALJ must consider the claimant’s physical, mental, educational
4 and linguistic limitations in determining whether the claimant had a good reason
5 for failing to cooperate by not attending a consultative examination. *Id.* The ALJ
6 must also consider any mental impairment that the claimant may have when
7 evaluating the claimant’s ability to cooperate with the disability review process.
8 *See Higbee v. Sullivan*, 975 F.2d 558, 562 (9th Cir. 1992).

9 Plaintiff contends he did not attend his consultative examination because he
10 chose not to pursue the physical side of his claim. ECF No. 16 at 15. This conflicts
11 with Plaintiff’s assertion that his obesity is a severe impairment that amounts to a
12 changed circumstance. *Id.* at 6-7. Plaintiff also contends the ALJ failed to
13 consider that Plaintiff’s limitations in leaving his home also limited his ability to
14 attend the examination. *Id.* at 15. However, when the Disability Analyst spoke
15 with Plaintiff’s counsel about the missed examination, the only report is that
16 Plaintiff did not want to pursue the physical component of his claim; there is no
17 mention of an inability to leave his home. Tr. 143. The ALJ reasonably found
18 Plaintiff failed to cooperate with the disability process.

1 On this record, the ALJ gave clear and convincing reasons, supported by
2 substantial evidence, to reject Plaintiff's symptom complaints. Plaintiff is not
3 entitled to remand on these grounds.

4 **E. Medical Opinion Evidence**

5 Plaintiff contends the ALJ erred in his consideration of the opinion of
6 Tasmyn Bowes, Psy.D. ECF No. 16 at 16-21. As an initial matter, for claims filed
7 on or after March 27, 2017, new regulations apply that change the framework for
8 how an ALJ must evaluate medical opinion evidence. *Revisions to Rules*
9 *Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg.
10 5844-01 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new regulations provide that
11 the ALJ will no longer "give any specific evidentiary weight...to any medical
12 opinion(s)" *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at
13 5867-68; *see* 20 C.F.R. § 416.920c(a). Instead, an ALJ must consider and evaluate
14 the persuasiveness of all medical opinions or prior administrative medical findings
15 from medical sources. 20 C.F.R. § 416.920c(a)-(b). The factors for evaluating the
16 persuasiveness of medical opinions and prior administrative medical findings
17 include supportability, consistency, relationship with the claimant (including
18 length of the treatment, frequency of examinations, purpose of the treatment,
19 extent of the treatment, and the existence of an examination), specialization, and
20 "other factors that tend to support or contradict a medical opinion or prior

1 administrative medical finding” (including, but not limited to, “evidence showing a
2 medical source has familiarity with the other evidence in the claim or an
3 understanding of our disability program’s policies and evidentiary requirements”).
4 20 C.F.R. § 416.920c(c)(1)-(5).

5 Supportability and consistency are the most important factors, and therefore
6 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
7 416.920c(b)(2). Supportability and consistency are explained in the regulations:

8 (1) *Supportability*. The more relevant the objective medical evidence
9 and supporting explanations presented by a medical source are to
10 support his or her medical opinion(s) or prior administrative
11 medical finding(s), the more persuasive the medical opinions or
12 prior administrative medical finding(s) will be.

13 (2) *Consistency*. The more consistent a medical opinion(s) or prior
14 administrative medical finding(s) is with the evidence from other
15 medical sources and nonmedical sources in the claim, the more
16 persuasive the medical opinion(s) or prior administrative medical
17 finding(s) will be.

18 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how
19 the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when
20 two or more medical opinions or prior administrative findings “about the same
issue are both equally well-supported ... and consistent with the record ... but are
not exactly the same,” the ALJ is required to explain how “the other most
persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
§ 416.920c(b)(3).

1 The Ninth Circuit recently addressed the issue of whether the changes to the
2 regulations displace the longstanding case law requiring an ALJ to provide specific
3 and legitimate reasons to reject an examining provider's opinion. *Woods v.*
4 *Kijakazi*, No. 21-35458, 2022 WL 1195334, at *3 (9th Cir. Apr. 22, 2022). The
5 Court held that the new regulations eliminate any hierarchy of medical opinions,
6 and the specific and legitimate standard no longer applies. *Id.* at *3-4. The Court
7 reasoned the "relationship factors" remain relevant under the new regulations, and
8 thus the ALJ can still consider the length and purpose of the treatment relationship,
9 the frequency of examinations, the kinds and extent of examinations that the
10 medical source has performed or ordered from specialists, and whether the medical
11 source has examined the claimant or merely reviewed the claimant's records. *Id.* at
12 *6. However, the ALJ is not required to make specific findings regarding the
13 relationship factors. *Id.* Even under the new regulations, an ALJ must provide an
14 explanation supported by substantial evidence when rejecting an examining or
15 treating doctor's opinion as unsupported or inconsistent. *Id.*

16 Dr. Bowes conducted a psychological consultative examination and rendered
17 an opinion on Plaintiff's functioning on January 28, 2019. Tr. 340-51. Dr. Bowes
18 diagnosed Plaintiff with PTSD; social anxiety disorder; disorder of written
19 expression, per past testing; and rule out dependent personality disorder. Tr. 342.
20 Dr. Bowes opined Plaintiff has moderate limitation in his ability to be aware of

1 normal hazards and take appropriate precautions; marked limitations in his ability
2 to understand, remember, and persist in tasks by following very short and simple
3 instructions, learn new tasks, make simple work-related decisions, and ask simple
4 questions or request assistance; and severe limitations in his ability to understand,
5 remember, and persist in tasks by following detailed instructions, perform
6 activities within a schedule, maintain regular attendance, and be punctual within
7 customary tolerances without special supervision, perform routine tasks without
8 special supervision, adapt to changes in a routine work setting, communicate and
9 perform effectively in a work setting, maintain appropriate behavior in a work
10 setting, complete a normal workday/workweek without interruptions from
11 psychologically based symptoms, set realistic goals and plan independently; and
12 opined Plaintiff overall has a “severe” severity rating. Tr. 343. Dr. Bowes opined
13 Plaintiff’s impairments were likely to last 18 or more months with available
14 treatment. *Id.* The ALJ found Dr. Bowes’ opinion was not persuasive. Tr. 16.

15 First, the ALJ found Dr. Bowes’ opinion was conducted during a time when
16 Plaintiff had not undergone any treatment for a sustained period. Tr. 16. While
17 the fact that a claimant fails to pursue treatment is not directly relevant to the
18 weight of a medical provider’s opinion, *see* 20 C.F.R. § 416.920c, the consistency
19 of a medical opinion with the record as a whole is a relevant factor in evaluating a
20 medical opinion, *see* 20 C.F.R. § 416.920c(2). As discussed *supra*, the ALJ found

1 Plaintiff's lack of any treatment for his reportedly disabling limitations undermined
2 the argument that the limitations are disabling. Dr. Bowes recommended Plaintiff
3 pursue mental health counseling, regular psychiatric evaluations, and medication,
4 Tr. 344, which he did not do. As the examination was performed during a time
5 when Plaintiff was not receiving counseling or medication, the examination may
6 not reflect the highest functioning Plaintiff is capable of. *See* Tr. 16, 341.

7 Plaintiff contends the ALJ failed to consider that his "Listing-level
8 impairment" prevented him from seeking treatment. ECF No. 16 at 18. As
9 discussed *supra*, Plaintiff did not cite to objective evidence to support his
10 contention his impairments meet a listing, nor did he set forth an argument that
11 demonstrates he meets the A criteria of any listing, and there is evidence from his
12 prior application and Dr. Bowes' examination that demonstrate Plaintiff can attend
13 appointments/examinations unaccompanied. The ALJ reasonably found Plaintiff's
14 lack of treatment undermined Dr. Bowes' opinion.

15 Second, the ALJ found Dr. Bowes' opinion was not supported by the
16 objective evidence nor was it supported by the narrative explanation. Tr. 16.
17 Supportability is one of the most important factors an ALJ must consider when
18 determining how persuasive a medical opinion is. 20 C.F.R. § 416.920c(b)(2).
19 The more relevant objective evidence and supporting explanations that support a
20 medical opinion, the more persuasive the medical opinion is. 20 C.F.R. §

1 416.920c(c)(1). While Dr. Bowes wrote “poor short-term memory noted,” there is
2 no explanation of memory test results to support the note. Tr. 16, 344. Dr. Bowes
3 checked that Plaintiff’s insight and judgment were within normal limits, but then
4 wrote “poor insight noted.” Tr. 16, 345. She also checked boxes indicating
5 Plaintiff correctly answered three fund of knowledge questions but checked a box
6 indicating Plaintiff’s fund of knowledge was abnormal, with no explanation. Tr.
7 16, 344. The ALJ reasonably found Dr. Bowes’ opinion was not supported by the
8 evidence and narrative explanation.

9 Third, the ALJ found Dr. Bowes’ opinion was based on Plaintiff’s self-
10 report. Tr. 16. As supportability is one of the most important factors an ALJ must
11 consider when determining how persuasive a medical opinion is, 20 C.F.R. §
12 416.920c(b)(2), a medical provider’s reliance on a Plaintiff’s unsupported self-
13 report is a relevant consideration when determining the persuasiveness of the
14 opinion. The ALJ noted that Dr. Bowes’ report contained two references to
15 Plaintiff’s self-reported symptoms/limitations. Tr. 16. As discussed *supra*, several
16 components of Dr. Bowes’ opinion lack support from objective evidence and
17 narrative explanation. As such, the ALJ reasonably found Dr. Bowes’ opinion
18 relied on Plaintiff’s self-report.

19 Next, the ALJ found Dr. Bowes only reviewed a single outdated evaluation.
20 Tr. 16. The extent to which a medical source is “familiar with the other

1 information in [the claimant's] case record" is relevant in assessing the weight of
2 that source's medical opinion. *See* 20 C.F.R. § 416.927(c)(6). The only record Dr.
3 Bowes reviewed was Dr. Schneider's 2011 examination. Tr. 341. Dr. Bowes did
4 not review the January 2017 examination in which Plaintiff was found to have
5 been malingering, Tr. 100, nor the February 2017 examination in which Plaintiff's
6 evaluation indicated symptom exaggeration, *id.* Dr. Bowes did not have any
7 records to review from the relevant period due to Plaintiff's lack of treatment.
8 While Plaintiff reported a year of treatment in 2012, which included counseling
9 and medication, Tr. 341, Dr. Bowes did not have the records to review to
10 determine if Plaintiff had any symptom improvement with treatment. The ALJ
11 reasonably found Dr. Bowes' opinion less persuasive given her review of the
12 records only included a 2011 examination. Plaintiff is not entitled to remand on
13 these grounds.

14 **F. Lay Witness Evidence**

15 Plaintiff contends the ALJ erred in his consideration of the lay opinions of
16 Plaintiff's siblings. ECF No. 16 at 21. Unlike medical sources, an ALJ is not
17 required to articulate how he considered evidence from nonmedical sources using
18 the factors under 20 C.F.R. § 416.920c. *See* 20 C.F.R. § 416.920c(d). Plaintiff
19 contends the ALJ rejected the lay witness testimony without giving any reason to
20 discount their testimony. ECF No. 16 at 21. This is inaccurate. The ALJ

discussed both lay witness statements and stated Plaintiff's statements and the lay witness statements were "not entirely consistent with the medical evidence and other evidence in the record for the reasons below." Tr. 14. The ALJ thus rejected the lay witness statements for the same reasons he rejected Plaintiff's statements. As discussed *supra*, the ALJ's rejection of Plaintiff's statements was supported by substantial evidence. As the lay witness statements largely restate Plaintiff's claims, the ALJ did not err in his consideration of the lay witness statements. *See Molina*, 674 F.3d at 1114, *superseded on other grounds by* 20 C.F.R. § 416.902(a). Further, the ALJ also noted inconsistencies between Plaintiff's brother's statement that Plaintiff had tried to work and the lack of any evidence in the record that such work attempt occurred. Tr. 15. The ALJ also noted that the siblings' statements about Plaintiff's incapacity to work are less persuasive because Plaintiff has no documented attempts to work. *Id.* Plaintiff is not entitled to remand on these grounds.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is supported by substantial evidence and free of harmful legal error. Accordingly, **IT IS HEREBY ORDERED:**

1. The District Court Executive is directed to substitute Kilolo Kijakazi as Defendant and update the docket sheet.

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

2 3. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
3 **GRANTED**.

4 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

5 The District Court Executive is directed to file this Order, provide copies to
6 counsel, and **CLOSE THE FILE**.

7 DATED January 3, 2023.

8 s/Mary K. Dimke
9 MARY K. DIMKE
10 UNITED STATES DISTRICT JUDGE
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